

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2008CA3292
)	EEOC NO.: 21BA82047
JUANA C. PEREZ)	ALS NO.: 09-0352
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman and Yonnie Stroger presiding, upon Juan C. Perez's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CA3292; and the Commission having reviewed *de novo* the Respondent's investigation file, including the Investigation Report and the Petitioner's Request, and the Respondent's response to the Petitioner's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. On May 19, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged her former employer Sunstar Americas, Inc., ("Employer") discharged her because of her disability, neck and shoulder disorder, tendonitis (Count A), and her age, 47 (Count B), in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"). On June 5, 2009, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence. After the Commission granted the Petitioner an extension of time to file her Request, the Petitioner timely filed her Request on August 11, 2009.
2. The Petitioner was hired by the Employer on November 15, 1989. During all times relevant to the Petitioner's allegations, her job title was Lead Packaging Machine Operator. The essential functions of the Petitioner's duties included reaching for objects that were above her shoulders and performing repetitive movements with her arms and hands.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

3. In 2004, the Petitioner was diagnosed with tendonitis. Her condition caused her to experience pain and weakness in both shoulders.
4. On or about September, 18, 2007, the Petitioner applied for Family and Medical Leave Act ("FMLA") leave, which was granted by the Employer. The FMLA leave was effective September 20, 2007 and extended through December 13, 2007.
5. On September 20, 2007, the Petitioner's doctor completed a "Return to Work/School Verification" form wherein he stated the Petitioner could return to work on September 24, 2007, but under restrictions that she avoid reaching above her head, and avoid repetitive motions with her arms and hands. Her doctor also recommended that her job duties be changed, and it was noted she had tendonitis in both shoulders.
6. The Petitioner filed a claim for Worker's Compensation benefits on October 24, 2007, based on her allegation that she had suffered a work-related injury on or about September 18, 2007. The claim was subsequently denied by an arbitrator of the Illinois Worker's Compensation Commission. The arbitrator determined her claim was not compensable because her injury did not arise out of or in the course of her employment.
7. Under the Employer's policy only employees with a job-related injury were allowed to return to work on light-duty.
8. The Employer required that all employees returning to work following a FMLA leave provide a full-duty medical release.
9. When the Petitioner's FMLA ended, the Petitioner admits she was not able to provide the Employer with a full-duty medical release. The Petitioner was still under medical restrictions as of December 12, 2007, which prevented her from performing many of the essential functions of her job.
10. The Petitioner alleged the Employer discharged her on December 13, 2007. However, the Employer states, following the end of the Petitioner's FMLA leave, beginning in January 2008, the Petitioner failed to contact them, and failed to provide updates of her medical status. The Employer sent the Petitioner a letter dated January 31, 2008, stating she had been absent without leave since the end of her FMLA leave. After receiving no response from the Petitioner, the Employer states it deemed her to have abandoned her position, and her discharge was formalized on March 6, 2008.
11. The Petitioner alleged in her charge she was discharged on December 13, 2007, because of her disability and age. In her Request, she reiterates her believe she was discharged because

of her age and disability. For the first time in her Request, she also argues she was discharged because of race and in retaliation for having filed prior Worker's Compensation claims.

CONCLUSION

The Commission's review of the Respondent's investigation file leads it to conclude the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D).

First, there is no substantial evidence in the file to support the Petitioner's contention she was discharged on December 13, 2007. The file shows the Petitioner was formally discharged on March 6, 2008, after the Petitioner had repeatedly failed to make contact with the Employer to advise it of her medical status following the expiration of her FMLA leave.

Second, assuming *arguendo* the Petitioner had been discharged on December 13, 2007, there is no substantial evidence the Employer engaged in disability or age discrimination. As to her disability claim, under the Act, the Petitioner must have had a . . . "determinable physical or mental characteristic..." which was "unrelated to...[her] ability to perform the duties of [her] particular job". . . See 775 ILCS 5/1-103(l)(1).

On December 13, 2007, the Petitioner admits she was still unable to perform the essential functions of her job. Therefore, as of December 13, 2007, the Petitioner was not disabled within the meaning of the Act. Assuming the Petitioner was discharged on December 13, 2007, the Commission finds no substantial evidence of a violation of the Act because the Act did not require the Employer to reassign the Petitioner to a new or "light duty" position.

As to the Petitioner's age discrimination claim, there is no substantial evidence that similarly-situated younger employees were treated more favorably than the Petitioner. The Employer provided evidence that it had discharged a similarly situated younger employee for having failed to return to work after that employee's FMLA leave had ended.

Finally, the Commission cannot consider the Petitioner's new claims of race discrimination and retaliation raised for the first time in her Request. On a request for review, the Commission is limited to considering only those claims originally raised in the charge and investigated by the Respondent. See 775 ILCS 5/8-103. The Petitioner does not offer any additional evidence in her Request that would warrant a reversal of the Respondent's original determination.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Department's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

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In the Matter of the Request for Review by: Juana C. Perez-2009CA3292

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Sunstar Americas, Inc, as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 10th day of February 2010.

Commissioner David Chang

Commissioner Marylee Freeman

Commissioner Yonnie Stroger